89-1144

No. _____

Supreme Court, U.S.
FILED
JAN 11 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

ERNEST E. SARGENT and CYNTHIA L. SARGENT,
Petitioners,

v.

PATHFINDER INCORPORATED, et al.,
Respondents

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

APPENDIX A

ROBERT A. ACKERMAN
1250 Fourth St., S.W., No. 504W
Washington, D.C. 20024
(202) 554-2908

Counsel for Petitioners

BEST AVAILABLE COPY

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S. App. D.C. Reports. Users are requested to notify the clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals
For the District of Columbia Circuit

Argued April 18, 1989 Decided August 15, 1989

No. 88-7133

ERNEST E. SARGENT, et al.

v.

PAINE WEBBER JACKSON & CURTIS, INC., ndba as PAINEWEBBER INCORPORATED, et al., APPELLANTS

Appeal from the United States District Court
for the District of Columbia
(D.C. Civil Action No. 84-02911)

Harvey A. Levin, with whom Michael I. Smith was on the brief, for appellants.

Stephen G. Milliken for appellee.

Before ROBINSON, BUCKLEY, and WILLIAMS, Circuit Judges.

Opinion for the court filed by Circuit Judge WILLIAMS.

WILLIAMS, Circuit Judge: In August 1983 Ernest E. Sargent and his daughter Cynthia L. Sargent opened an account with PaineWebber. To it they transferred 400 shares of Coleco Industries stock, some put and call options on Coleco, and some other (unspecified) securities. Ernest Sargent maintains that this portfolio embodied his life's savings.

The price of Coleco stock had been sinking since the Sargent's original purchase, and it continued to do so after the transfer. Soon after moving the account, Ernest Sargent sought to address the problem by directing Kevin Greenan, a PaineWebber account executive, to implement a "cost averaging plan." This consisted of

> purchas[ing] additional shares of Coleco stock at the decreased market price to reduce his average cost basis in all of his Coleco stock. When the average cost basis of the Coleco stock was equal or close to the market value, Sargeant planned to sell all of that stock thereby eliminating or reducing any financial loss.

Arbitration Complaint ¶ 12. The obvious flaw of such a scheme is that if the stock does not rise as hoped, it will amount to throwing good money after bad.

In any event, the Sargents' claim is that PaineWebber and Greenan were negligent in not rigorously pursuing the plan. They initially brought suit in district court, seeking $245,000 in compensatory damages (later amended to $256,000) and $500,000 in punitives. On PaineWebber's motion to stay the case pending arbitration, as provided in the customer agreements between the Sargents and PaineWebber, the court dismissed the action without prejudice. The arbitrators conducted a three-day hearing and announced a decision awarding the Sargents $46,000. They stated only that

> having heard and considered the proofs of the parties, [a majority of the arbitrators] have decided and determined that in full and final settlement of the above-referenced matter, respondent PaineWebber shall pay to the claimants the

sum of $43,000.00 and respondent Kevin Greenan shall pay to the claimants the sum of $3,000.00.

The arbitrators did not explain how they reached this figure. The parties agree that the New York Stock Exchange rules require no explanation; it appears to be standard practice for arbitrators under those rules to give none.

The Sargents filed a new complaint, asking the district court to vacate the award, while PaineWebber cross-moved for an order of confirmation. Instead the court remanded the matter to the arbitration panel "for a full explanation of the manner in which damages were computed so as to permit effective judicial review." It viewed such an explanation as necessary if judicial review was to be "meaningful."

PaineWebber and Kevin Greenan appeal. They argue that the Federal Arbitration Act, 9 U.S.C. §§ 1-14 (1982), does not authorize a

remand for explanation under the circumstances. We agree. Before addressing the point, however, we must dispose of the plaintiffs' challenge to our jurisdiction and the defendants' claim that the Sargents' motion to vacate was served too late.

Appellate jurisdiction rests on 28 U.S.C. § 1292 (b) (1982). This allows an interlocutory appeal (with the consent of the court of appeals, which in this case has been granted through a motions panel of this court), where a district judge states, in an otherwise unappealable order, that he is

> of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation...

Application for an appeal under § 1292(b) does not automatically stay proceedings in the district court, but that court or the court of appeals may order a stay. 28 U.S.C. § 1292(b).

The Sargents' attack on our jurisdiction depends on the failure of the district court's order to track the language of § 1292(b), and on its omission of any citation of that section. The order reads:

> Upon consideration of the motion of defendants for a stay pending appeal of this Court's Orders of May 10, 1988 and December 8, 1987, and the opposition thereto, the Court finds (1) that defendants will possibly suffer harm in the lost [sic] of their right and expectation to a speedy and conclusive arbitration process, (2) that defendants have shown that serious questions of law exist, as to this Court's authority to order the arbitrators to file a memorandum with the Court giving a full explanation of the manner in which damages were computed, and (3) that plaintiffs' recovery will not be reduced and their right to recovery will not be diminished by a stay pending appeal.

Sargent v. Paine Webber Jackson & Curtis, Inc., No. 84-2911, Order (D.D.C. June 27, 1988). The order then provides that the remand be "stayed pending appeal, pursuant to Rule 62, Fed. R. Civ. P." Id. A motions panel of this court granted defendants' application for an appeal, citing § 1292(b)

and making findings in precisely its words. It added that the court was not deciding whether "in the absence of a section 1292(b) certification, there is an appealable order."

It is hard to view our earlier order except as reading the district court order as a certification under § 1292(b). If there be any ambiguity in our initial decision, however, we have no difficulty in making that finding ourselves. Obviously dispute may be avoided if district courts couch their §1292(b) certifications in its terms and, to remove all doubt, cite it by section number. But the words of § 1292(b) are not a magic incantation (or a computer command) that has no effect if not given exactly. The court's intentions are plain. Not only are the words fairly close to those of § 1292(b), but there appears no explanation for the district court's stay other than as one that § 1292(b) authorizes as an accompaniment to a § 1292(b) certification. We have jurisdiction.

Defendants claim that the Sargents' claim was barred by the special three-months statute of limitations contained in 9 U.S.C. § 12 (1982). It requires:

> Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered.

9 U.S.C. § 12 (1982) (emphasis added). The Sargents' complaint and motion were served November 26, 1986,[1] more than three months after the arbitrators' decision but within three months of the Sargents' receipt of it on August 26, 1986.

---

[1]The docket entries show only that the new complaint and motion to vacate were filed November 26, 1986, but the parties have treated this as the controlling date. This is correct if the Sargents served the papers by mail on the date of filing, and if (despite dismissal of the original complaint) the new one may be regarded as a "pleading subsequent to the original complaint" within the meaning of Rule 5(a), Fed. R. Civ. P., as Rule 5(b) makes service by mail complete on mailing.

Defendants argue that "delivered" in the phrase "filed or delivered" must mean "mailed, or otherwise sent." They suggest that since delivery must always follow a decision's filing, to read it as referring to the arrival at some destination would render "filed" meaningless. Certainly defendants have identified a curiosity in the statute, but their interpretation hardly solves it: they suggest no way in which mailing could precede filing any more than delivery. Perhaps the drafters contemplated the possibility of some technically defective filing, and wanted to be sure that in such a case the time limit would begin to run on delivery. We certainly see no reason to adopt a construction that hopelessly twists the ordinary meaning of the word "delivered" without in any way solving the problem of possible surplusage. Nor would we be justified in excising "delivered" from the statute.

Defendants' argument that delivery is not synonymous with receipt does no better. While one can imagine cases in which the distinction could play a role, this is not one. The Sargents acknowledge receipt of the decision on the day it was delivered to the relevant address, and their complaint and motion were served within the required three months thereafter.

Turning to the merits, we find no basis for a remand to the arbitrators. The district court's review proceeds under § 10 of the Federal Arbitration Act, which authorizes it to vacate an arbitral award under any of the following conditions:

> (a) Where the award was procured by corruption, fraud, or undue means.
>
> (b) Where there was evident partiality or corruption in the arbitrators, or either of them.
>
> (c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any

other misbehavior by which the rights of any party have been prejudiced.

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(e) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

9 U.S.C. § 10 (1982). The district court here appears to have proceeded under the theory that in the absence of explanation it could not be sure that the arbitrators had not "exceeded their powers" under § 10(d) or otherwise fallen into error so egregious as to require vacation of the award under § 10. Remand for explanation would enable it to obtain that assurance and exclude the possibility of a fatal error.

We reject the idea that a lump-sum award can be rejected for want of explanation (or, what is in effect almost the same thing, remanded for an explanation) in the absence of

facts making it appear probable that the arbitrators committed an error justifying vacation of the award. If courts required an explanation on account of the mere possibility of such an error, they could in effect be requiring explanation almost universally. The Supreme Court has observed that arbitral awards may be made without explanation, see Wilko v. Swan, 346 U.S. 427, 436 (1953), and the Second Circuit has so held. Sobel v. Hertz, Warner & Co., 469 F.2d 1211 (2d Cir. 1972). It reasoned that while arbitration "may not always be the speedy and economical remedy its admirers claim it is," id. at 1215,

> forcing arbitrators to explain their award even when grounds for it can be gleaned from the record will unjustifiably diminish whatever efficiency the process now achieves.

Id. (footnote omitted). In that case the arbitrators said only that they dismissed the claim, but, given the presence of "a number of theories" on which they might have decided,

id., the court found no need of further proceedings. Thus, the court plainly believed that the necessary "gleaning" was normally possible so long as the record disclosed a permissible route to the stated conclusion.

The Second Circuit has rigorously applied this view. Even where the size of an award was said to suggest that the arbitrators might have considered lost profits or consequential damages despite a contractual agreement disallowing such recoveries, it held that

> arbitrators may render a lump sum award without disclosing their rationale for it, and ... when they do, courts will not inquire into the basis of the award unless they believe that the arbitrators rendered it in "manifest disregard" of the law or unless the facts of the case fail to support it.

Koch Oil, S.A. v. Transocean Gulf Oil Co., 751 F.2d 551, 554 (2d Cir. 1985). The court refused to vacate the award, viewing the challenge as no more than "speculation."

Clearly insistence on an explanation would increase the ability of courts to spot the

sort of "manifest disregard" of the law that justifies overturning an arbitral award. Compare Wilko v. Swan, 346 U.S. at 440 (Frankfurter, J., dissenting, asserts ability of courts to discover arbitrators' disobedience of the law, asserting as a premise the point rejected by majority--that they must give some form of opinion from which the disobedience will appear). But the absence of a duty to explain is presumably one of the reasons why arbitration should be faster and cheaper than an ordinary lawsuit. We thus agree with the Second Circuit that an explanation requirement would unjustifiably undermine the speed and thrift sought to be obtained by the "federal policy favoring arbitration," Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 24 (1983).

Here there is nothing to suggest that the arbitrators indulged in any disregard of the law. PaineWebber's defense throughout has

been comparative negligence and ratification: that Ernest Sargent (who described himself as a first-time investor) was sophisticated, knew the risks, himself "directed" the trading in his account (he denied this), received notice of PaineWebber's trades, and failed to complain about PaineWebber's actions or alleged inactions during the crucial first five months he maintained an account--the months during which the losses occurred. Thus, it seems likely that in some form the arbitrators apportioned blame to both sides and calculated the award accordingly; plaintiffs offer no basis for thinking that such an outcome showed "manifest disregard" of the law.

Plaintiffs rely heavily on decisions or dicta approving remand of an arbitral award for clarification of its meaning. See, e.g., Galt v. Libbey-Owens-Ford Glass Co., 397 F.2d 439 (7th Cir. 1968) (approving remand to

determine whether arbitrators treated specific contract clause as within purview of arbitration provision); Sobel v. Hertz, Warner & Co., 469 F.2d at 1216 (alluding to and distinguishing cases of remand to clarify what issues arbitrators resolved). These clearly have no application here. Plaintiffs' suggestion that the panel may not have resolved the punitive damages issue is utterly fanciful.

Plaintiffs also note the observation in Siegel v. Titan Industrial Corp., 779 F.2d 891 (2d Cir. 1985), that where an award "appears to have been reached on the basis of a precise mathematical calculation,"

> [a] remand for clarification ... would not improperly require arbitrators to reveal their reasons, but would instead simply require them to fulfill their obligation to explain the award sufficiently to permit effective judicial review.

Id. at 894. We do not read this as any material qualification of the view taken by the Second Circuit in Sobel. The court

proceeds to cite Sobel immediately after the quoted passage and in fact goes on to hold that, despite obscurity as to the arithmetic leading to the award, there was no "manifest error," id., and that the district court correctly declined to remand. Further, the circumstance to which the Second Circuit referred--apparent use of a "precise mathematical calculation"--is absent here.

The defendants' and district court's invocation of the goal of rendering judicial review "effective" or "meaningful" of course resonates with innumerable decisions in the field of administrative law remanding to an agency for a new or clearer articulation of its reasoning. As early as SEC v. Chenery Corp., 318 U.S. 80, 94 (1943), the Court remanded for a further explanation, stating that "the courts cannot exercise their duty of review unless they are advised of the considerations underlying the action under

review." See also Greater Boston Television Corp v. FCC, 444 F.2d 841, 850-53 (D.C. Cir. 1970). But as we have recently noted in another context, the statement cannot be read as a statement of any literal impossibility of meaningful or effective judicial review. Women Involved in Farm Economics v. Department of Agriculture, 876 F.2d 994, 998-1000 (D.C. Cir. 1989). The Chenery court itself presented the requirement as manifesting a special form of deference to administrative agencies: a judicial assumption that an agency relied on a specific policy judgment, where there was no clear reason to think it had, would "intrude upon the domain which Congress has exclusively entrusted" to the agency. Chenery, 318 U.S. at 88; see also id. at 94-95; Women Involved, 876 F.2d at 999 (reliance on an argument of counsel "might actually restrict improperly the agency's future freedom of action"). The concern for

preserving an agency's policymaking discretion clearly has no place in the context of arbitration.

More generally, it is simply not true that insistence on an explanation of the decision-maker's thought process is an automatic requirement of "effective judicial review." In the context of arbitration, where there is no statutory requirement that the panel state its reasons, and (as here) none imposed by the institution under whose auspices that arbitration occurred, it would seem to turn on a balance between the interest in rooting out possible error and the interest in assuring that judgment be swift and economical. We agree with the Second Circuit that the latter must generally prevail. As the record here fails to indicate the probability of "manifest disregard" of the law, there is no basis to insist on an explanation.

On the facts before it, the district court's duty was to grant the motion to confirm the award. The case is remanded for entry of a suitable order.

So ordered.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ERNEST E. SARGENT, et al.	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action
	)	No. 84-2911
	)	
PAINE WEBBER, JACKSON & CURTIS, INC. et al.,	)	
	)	
Defendants.	)	
	)	

MEMORANDUM ORDER
(Denying Defendants' Motion for Reconsideration)

Defendant's Paine Webber, Jackson and Curtis, Inc. have moved for reconsideration of this Court's Memorandum Order of December 8, 1987, which vacated the arbitral award of August 19, 1986, and remanded the matter to the New York Stock Exchange ("NYSE") Arbitration Panel. The Court's Memorandum Order directed that the arbitration panel provide a full explanation of the manner in

which $46,000 damages awarded to plaintiffs were computed so as to permit effective judicial review. Defendants argue that the plaintiffs' motion to vacate the August 19th award was untimely and barred by the Federal Arbitration Act ("FAA"). 9 U.S.C. §§ 1-14. They also contend that this Court exceeded its authority in vacating and remanding the award.

After a review of the legal memoranda submitted by the parties, as well as the applicable law, this Court finds no new evidence, argument, or law that would justify reconsideration of the Court's December 8, 1987 Memorandum Order. For the reasons set forth below, the Court denies the defendant's motion for reconsideration.

FACTUAL BACKGROUND

The award in question here was rendered on August 19, 1986, but was not filed in the

formal sense. Rather, it was sent by letter dated August 21, to plaintiffs' attorney, Marc White. It is not clear when Mr. White received the letter. Plaintiffs state however, and it is not disputed, that they did not receive a copy of the arbitral decision until August 27, 1986. On September 4, 1986, plaintiff Earnest Sargent and his attorney both wrote to the Director of Arbitration at the NYSE and requested a hearing de novo. The Director denied their requests in a letter dated September 23, 1986. Prior to receiving the Director's letter, on September 25, 1987, attorney White wrote to Mr. Sargent, informing him that he was "willing to go through another hearing at the [arbitration panel] if they grant our request." In the event that the request was denied, Mr. White indicated that he would possibly be "willing to file a motion to vacate" the $46,000 award for the plaintiffs.

For reasons not reflected in the record and at a date uncertain, Mr. White later chose not to represent the plaintiff.

As a result of attorney White's latent unwillingness to file an action to vacate the arbitration award, plaintiffs had less than two months to file such an action. On November 26, 1986, more than three months from the date of the award, but less than three months from plaintiffs' August 27, 1986 receipt of the decision, plaintiffs filed a pro se motion to vacate the arbitration panel's award.

On December 8, 1987, this Court granted plaintiffs' motion and vacated the arbitral award of August 19, 1986. Because the award to plaintiffs represented less than 20 percent of the approximately $256,000 which they had lost during the period the defendants managed their investment accounts, the Court held that it could not clearly ascertain the

basis for the award, nor could it be certain whether the arbitration panel considered all the relevant information. Given the uncertainty and ambiguity surrounding the award, the Court ordered that the matter be remanded to the arbitration panel for a full explanation of the manner in which damages were computed so as to permit effective judicial review. Defendants' cross-motion to confirm the award was denied.

On December 17, 1987, defendants filed the present motion for reconsideration of the Court's Memorandum Order. The Sargents, now represented by counsel, opposed the defendants' motion.

LEGAL ANALYSIS

A.

The Court will first address the defendants' challenge that the plaintiff's motion to vacate was time-barred by a

three-month statute of limitation. Section 12 of the FAA provides in part:

> Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered.

9 U.S.C. § 12 (emphasis added).

The very language of 9 U.S.C. § 12 is ambiguous -- the date that the award is "filed or delivered" can lead to different results as is evident from the case law. Some courts have interpreted the phrase to mean the date designated on the face of the award. (Witt v. Reinholdt & Gardner, 587 F.2d 383, 384 (8th Cir. 1978); Colavito v. Hockmeyer Equipment Corp., 605 F. Supp. 1482, 1487 (S.D.N.Y. 1985)). Other courts look to the date the award was filed or entered, referring to the date the award was actually docketed as contrasted to the date on the face of the award. (Foster v. Turley, 808 F.2d 38, 41 (10th Cir. 1986); (Tokura

Construction Co., Ltd. v. Corporacion Raymond, S.A., 533 F. Supp. 1274 (S.D. Tex. 1982). However, several courts have held that an application to vacate must be made within three months of receipt of the decision. (Dinger v. Anchor Motor Freight, Inc., 501 F. Supp. 64 (S.D.N.Y. 1980) ("An application to vacate or modify an arbitral award must be made within three months of receipt of the decision under federal law." Id. at 68 (citing 9 U.S.C. § 12) (emphasis added). Because the plaintiff challenged the arbitrator's award more than eleven months after receiving the decision, the court held that his claim was time-barred.) If "delivery" of the award is deemed to be receipt of the award, as declared in Dinger, the motion to vacate was timely filed by the Sargents.

1.

But even if the "delivery" of the award is determined to be the day it was mailed,

plaintiffs' right to judicial review of the award is not forfeited because the doctrine of equitable tolling should be applied in this case.

The equitable tolling doctrine is "read into every federal statute of limitation." Holmberg v. Armbrecht, 327 U.S. 392, 397 (1946). Numerous courts have held that the equitable tolling doctrine is "plainly available to federal securities law plaintiffs." Osterneck v. E.T. Barwick Industries, Inc., 825 F.2d 1521 (11th Cir. 1987) (citing Schaefer v. First National Bank, 509 F.2d 1287, 1295-96 (7th Cir. 1975), cert. denied, 425 U.S. 943 (1976). While this proceeding is not a federal securities law case, the activities involved were of a commercial nature. In tolling the statute of limitations in the commercial context, courts look for fraud on the part of the defendants and diligence on the part of the plaintiffs.

Osterneck, supra, at 1535; Suslick v. Rothschild Securities Corp., 741 F.2d 1000, 1004 (7th Cir. 1984).

Time limits for filing actions under Title VII are subject to equitable tolling, as well. In Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 393 (1982), the Supreme Court held that a time limit for filing a discrimination claim was "like a statute of limitations, ... subject to waiver, estoppel, and equitable tolling." A court's equitable power to toll a statute of limitations may be exercised in carefully circumscribed instances. The Supreme Court has laid out examples of when a court may properly allow tolling:

> [Where] a claimant has received inadequate notice, ... where a motion for appointment of counsel is pending and equity would justify tolling the statutory period until the motion is acted upon, ... where the court has led the plaintiff to believe that she had done everything required of her ... [or] where affirmative misconduct on the part of a defendant lulled the plaintiff into inaction.

Baldwin County Welcome Center v. Brown, 466 U.S. 147, 151 (1984) (per curiam) (citations omitted).

The facts in this case fall within the circumscribed instances as defined by the Supreme Court. Plaintiffs believed that the NYSE may hold a new hearing in their case; they also thought their attorney may pursue a possible motion to vacate the arbitrators' award; plaintiff Earnest Sargent explored several avenues of additional relief; in the end, he filed a motion to vacate the award himself.

The fact that plaintiff Sargent filed his motion pro se lends further support to the application of the doctrine of equitable tolling. This Circuit has recently held that an appellant who brought a suit in forma pauperis should not have his case dismissed for failure to comply with the 30-day time

limit to serve his complaint.[1] Mondy v. Secretary of the Army, No. 86-5644, slip op. (D.C. Cir. April 26, 1988). In Mondy, the plaintiff's complaint was served upon the defendant four months after he received notice regarding the final agency action on his employment discrimination claim. Under the relevant statute, the time for the plaintiff to bring suit began running from the date of his receipt of notice of final action on his claim. Because the plaintiff was filing in forma pauperis and diligently pursued his complaint, the court of appeals applied the doctrine of equitable tolling. Id. at 6-13.

The Mondy court referred to two circuit cases involving an in forma pauperis party for further support. In Paulk v. United

---

[1]While the case before this Court was brought pro se, there is no reason to believe that an in forma pauperis case would be given greater indulgence than a pro se case.

States, 830 F.2d 79, 83 (7th Cir. 1987), the Seventh Circuit held that a 30-day time limit was tolled during the pendency of a petition to proceed in forma pauperis. In Cooper v. Bell, 628 F.2d 1208 (9th Cir. 1980), the Ninth Circuit found that the need for equitable tolling is strongest when a claimant is filing an action for himself at the outset, because he will be "unschooled in the filing procedure" and less articulate about his claim. Id. at 1213 & n. 10.

Plaintiff Sargent acted diligently and therefore, the Court may properly invoke equitable principles to excuse his slight delay. See Baldwin County Welcome Center, supra, at 151. See also, Mondy, supra, at 3, 13. The due diligence exception to 9 U.S.C. § 12 was recognized in Holodnak v. Avco Corp., 381 F. Supp. 191 (D. Conn. 1974), rev'd in part on other grounds, 514 F.2d 285 (2nd Cir.), cert. denied, 423 U.S. 892

(1975). In Holodnak, the plaintiff's motion to vacate an arbitrator's award was served three months and one day after the filing of the arbitration award. The district court judge and the magistrate who heard pre-trial motions both denied the defendant's argument that the plaintiff's motion to vacate was time-barred. They emphasized the due diligence of the plaintiff in attempting to perfect service within the time limit and the absence of any prejudice suffered by the defendants as a result of the one-day delay. 381 F. Supp. at 197. The trial court agreed that the circumstances of the service did not represent a bar to the action and it granted plaintiff's motion to vacate the arbitrator's decision.

Plaintiff Sargent's efforts to comply with 9 U.S.C. § 12 would qualify for this exception. Depending upon the interpretation of "filed or delivered," plaintiff's motion

was anywhere from eight days late to one day early. The courts dismissing motions for being untimely under 9 U.S.C. § 12 have involved cases where service has been many months or years beyond the three month deadline. See Witt v. Reinholdt & Gardner, supra (Plaintiff filed suit to invalidate an arbitration award more than two years after the arbitration proceeding); Colavito v. Hockmeyer, supra (November 1983 filing was untimely with respect to an October 1982 arbitrator's award); Gas Workers Local No. 80 v. Michigan Consol. Gas Co., 503 F. Supp. 155 (E.D. Mich. 1980) (Proceeding to set aside award was filed eleven months after arbitrator denied request for reconsideration and hence, was untimely); Pizzuto v. Hall's Motor Transit Co., 409 F. Supp. 427 (E.D. Va. 1976) (Complaint filed more than twelve months after arbitration of employment grievance was not timely).

2.

In light of plaintiff's attempt to seek a hearing de novo, his attorney's failure to file a motion to vacate, the plaintiff's pro se status, and his diligent effort to serve his motion within the three month period, along with the different interpretations of "filed or delivered," this Court holds that plaintiff Earnest Sargent's motion to vacate the arbitration award of August 19, 1987, was not time-barred.

B.

Regarding the defendants' argument that this Court exceeded it authority in vacating the arbitrators' award, this Court adheres to its original holding that it should not attempt to enforce an award that is ambiguous, indefinite or irrational. See NF & M Corp. v. United Steelworkers of America, 524 F.2d 756 (3rd Cir. 1975) ("If an examination of

the record before the arbitrator reveals no support whatever for his determinations, his award must be vacated." Id. at 760). The Court upholds its position that for judicial review to be meaningful, an arbitrator's award cannot be absolutely immune from scrutiny. See Siegel v. Titan Industrial Corp., 779 F.2d 891, 894 (2d Cir. 1985); Olympia & York Florida Equity Corp. v. Gould, 776 F.2d 42, 45-46 (2nd Cir. 1985); Cleveland Paper Handlers & Sheet Straighteners Union, No. 11 v. E.W. Scripps Co., 681 F.2d 457, 460 (6th Cir. 1982) (per curiam) Oil Chemical & Atomic Workers Int'l Union v. Rohn & Haas Texas, Inc., 677 F.2d 492, 495 (5th Cir. 1982) (per curiam); Americas Ins. Co. v. Seagull Compania Naviera, S.A., 774 F.2d 64, 67 (2nd Cir. 1980); Shearson Loeb Rhoades Inc. v. Much, C.A. No. 81-4225 at 8-9 (N.D. Ill, Jan. 3, 1983). These cases were relied upon in the Court's December 8, 1987

Memorandum Order and further research indicates that they are still good law.

When reviewing arbitration awards it is necessary for a court to understand the calculation methods used by the arbitrators. Siegel, supra, at 894. The Court is not asking too much in seeking a clarification of the illusionary and ambiguous mathematical calculation utilized in arriving at plaintiffs' $46,000 award. See Douglas Aircraft Co. v. NLRB, 609 F.2d 352, 354 (9th Cir. 1979) ("It was proper to obtain from the arbitrator a clarification of his reasoning. The original opinion was ambiguous, and indeed the clarified opinion belied the Board's confident interpretation of the original." Id. at 354 (citations omitted)). The award represents a fraction of the $256,000 amount which the plaintiffs claim they lost due to defendants' breach of fiduciary duty.

To avoid judicial guessing as to the rationale behind the award and to permit effective judicial review, it was entirely appropriate for this Court to vacate and remand the arbitrators' award for further explanation.

Accordingly, it is this 10th day of May, 1988,

ORDERED

That defendant's motion for reconsideration of this Court's Memorandum Opinion of December 8, 1987, is denied.

This matter is remanded to the NYSE Arbitration Panel for a full explanation of the manner in which damages were computed so as to permit effective judicial review. The panel shall act expeditiously on this matter and file an appropriate memorandum in accordance with the Memorandum Order of

December 8, 1987, and this Order, on or before July 1, 1988.

[signed]
Barrington D. Parker
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ERNEST E. SARGENT, et al.	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action
	)	No. 84-2911
	)	
PAINE WEBBER, JACKSON & CURTIS, INC. et al.,	)	
	)	
Defendant.	)	
	)	

MEMORANDUM ORDER
(Vacating Arbitration Award and Remand)

Plaintiffs, Ernest and Cynthia Sargent, filed this action against the brokerage house, Paine Webber, Jackson & Curtis, Inc. ("Paine Webber"), and several of its agents alleging negligent management of plaintiffs' investment accounts. On October 31, 1984, an Order was entered dismissing without prejudice, allowing plaintiffs the right to

seek appropriate judicial relief, following the completion of arbitration proceedings as provided under earlier agreements between the required parties. Plaintiffs' submission to an arbitration board was required by the "Client Option Agreements," and was mandated by the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-14.[1]

Arbitration took place in July 1986, before a panel of three arbitrators selected in accordance with New York Stock Exchange ("NYSE") Rules. On August 19, 1986, in a 2-1 decision, the panel awarded the Sargents $46,000, representing less than 20 percent of the approximately $260,000 that plaintiffs had lost during the period the defendants managed their account.

---

[1] The Federal Arbitration Act provides that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. §2 (1987).

Plaintiffs then moved this Court to vacate the arbitral award; Paine Webber filed a cross motion seeking confirmation of the award.

For the reasons set forth herein, the Court grants plaintiffs' motion to vacate the arbitration award and denies defendants' cross-motion. The matter is remanded to the NYSE Arbitration Panel for clarification.

BACKGROUND

In July 1983, plaintiffs retained Paine Webber to manage their stock portfolio, consisting primarily of shares of stock and put and call options in Coleco Industries. Sometime after their initial purchases of Coleco, the share price of that stock declined. To minimize or eliminate losses, plaintiff Earnest Sargent devised a "cost averaging plan," whereby he would purchase additional shares of Coleco at the reduced

market price and hold them until the price began to rise. Under this plan, plaintiffs could recover losses at a per-share price lower than that at which they made their initial purchases. This plan required that defendants be attentive to the daily fluctuations in the value of Coleco stock and to respond accordingly without delay.

Throughout the fall of 1983 and into 1984, plaintiffs' investment managers allegedly ignored crucial changes in the price of Coleco and failed to respond according to instructions. As a result, plaintiffs lost money which they estimated at some $256,000. In an attempt to regain their losses, plaintiff instituted suit in this Court.

As permitted by the NYSE rules, the arbitration panel kept no record and entered no findings of fact or conclusions of

law.[2] Marc White, then serving as plaintiff's attorney in the arbitration proceedings, apparently felt the award was so grossly deficient as to "constitute [ ] error that must be remedied."[3] Even so, Mr. White evidently did not agree with plaintiffs on the proper basis for further action and consequently ceased representing their interests. Subsequent to the arbitration award the plaintiffs' have not been represented by counsel and their motion to

---

[2] Rule 624 of the New York Stock Exchange Rules states: "Unless requested by the arbitrators or a party or parties to a dispute, no record of an arbitration shall be kept." NYSE, Arbitration Rules, Article XI, Rule 624 (1983).

[3] Exhibit D to plaintiffs' Motion to Vacate (letter from Marc A. White to Robert S. Clemente Esq., Director of Arbitration, NYSE, dated September 4, 1986).

vacate the arbitration award was filed pro se.[4]

DISCUSSION

A district court has the prerogative to exercise independent review of an arbitration award under the Federal Arbitration Act. 9 U.S.C. §§ 9-10 (1987). Section 10 of the Act specifically gives United States district courts the power to vacate arbitration awards. Id. § 10. Even so, courts must bear in mind that judicial review of arbitrators' decisions is very narrowly limited.

---

[4] Plaintiffs also allege that the dissenting arbitrator, Mr. William Jones, was biased. According to the plaintiff, Mr. Jones was party to Nunes v. Legg, Mason, Wood & Walker, Inc., C.A. No. 81-0119, a securities fraud action in which Paine Webber's employees allegedly appeared as witnesses. Mr. Jones however, was not a party to the suit, he was merely an officer of the corporate defendant. Paine Webber's involvement in the case was even more tenuous -- the record reveals that Paine Webber's deposition was noticed, not that it was actually taken. Nunes was dismissed shortly thereafter.

It is well settled, however, that a court should not attempt to enforce an award that is ambiguous, indefinite or irrational. Although a court is precluded from overturning errors in factual determinations, "nevertheless, if an examination of the record before the arbitrator reveals no support whatever for his determinations, his award must be vacated." NF & M Corp. v. United Steelworkers of America, 524 F.2d 756, 760 (3d Cir. 1975) (emphasis added).

Since the record before the arbitrators has not been presented and the decision by the panel is very brief and unaccompanied by any explanation of the damage calculation,[5]

---

[5] The August 19, 1986, Arbitration Decision was a standardized form with the following customized phrase:

> [In] full and final settlement of the above-referenced matter, respondent Painewebber [sic] shall pay to the claimants the sum of $43,000.00 and respondent Kevin Greenan shall pay to the claimants the sum of $3,000.00, and

this Court cannot determine whether the award is supported by the record. It is also impossible to discern what calculation led to a final award which was only one-fifth of the amount claimed by the plaintiffs. In light of these deficiencies, effective judicial review of the arbitration award is extremely difficult.

For judicial review to be meaningful, an arbitrator's award cannot be absolutely immune from scrutiny. Siegel v. Titan Industrial Corporation, 779 F.2d 891, 894 (2d Cir. 1985). Several courts have remanded awards to arbitrators to clarify their meaning or effect. See Olympia & York Florida Equity Corp. v. Gould, 776 F.2d 42, 45-46 (2d Cir. 1985) (award was ambiguous and "warrant[ed] a

---

further upon claimants [sic] request and with the consent of respondents the claims of the claimants against respondents Bruce Edginton, C. Jordan Ball and Joan Doyle are in all respects dismissed.

remand to the arbitrators to enable them to state what their true intention was. . . ."); Americas Ins. Co. v. Seagull Compania Naviera, S.A., 774 F.2d 64, 67 (2d Cir. 1980) ("an ambiguous award should be remanded to the arbitrators so that the court will know exactly what it is being asked to enforce."); Cleveland Paper Handlers & Sheet Straightners Union, No. 11 v. E.W. Scripps Co., 681 F.2d 457, 460 (6th Cir. 1982) (per curiam) ("an ambiguous award may not be enforced but should be remanded to the arbitrator."): Oil Chemical & Atomic Workers International Union v. Rohn & Haas Texas, Inc., 677 F.2d 492, 495 (5th Cir. 1982) (per curiam) ("remand to the arbitrator is the appropriate disposition of an enforcement action when an award is patently ambiguous. . ."); Shearson Loeb Rhoades Inc. v. Much, C.A. No. 81-4225 at 8-9 (N. D. Ill., Jan. 3, 1983) ("the court concludes that the award is

without support in the record. . . . . the court therefore, in the exercise of its discretion, directs a rehearing by the Arbitrator of the damage calculations.")

When reviewing arbitration awards, it is often necessary for a court to understand the calculation methods utilized by the arbitrators. In Siegal, the Second Circuit held:

> Where. . . . an arbitrator's award appears to have been reached on the basis of a precise mathematical calculation, it is desirable, and in some cases may be necessary, to know the basis for the calculations underlying the award. A remand for clarification in such circumstances would not improperly require arbitrators to reveal their reasons, but would instead simply require them to fulfill their obligation to explain the award sufficiently to permit effective judicial review. 779 F.2d at 894 (emphasis added).

If considerable doubt surrounds an award, a court is justified in remanding it back to the arbitrators. In Shearson Loeb, the district court held that the basis for an arbitration award favoring the brokerage

house's customer was not clear and remanded for a recalculation of the damages. Working with more evidence and a more detailed record than is now before this Court, the Shearson Loeb court determined that the damage portion of the award was based on "sheer speculation." Noting that newly discovered evidence is not a proper basis for remanding an arbitration award, the court stated that it "expects the parties to present new and hopefully more precise methods for determining the extent of Mr. Much's [the customer's] damages from the primary facts already of record." C.A. No. 81-4225 at 3 (N. D. Ill., Oct. 20, 1983).

When Shearson Loeb appealed the district court's vacation and remand of the award, the Seventh Circuit sent the case back to the arbitrator. Shortly thereafter, the arbitrator held a damages hearing and the final arbitration award, confirmed by the

district court, was much different than the original award.

It is entirely appropriate for a district court to direct arbitrators to explain their awards. Galt v. Libbey-Owens-Ford Glass Co., 397 F.2d 439, 442 (7th Cir. 1968). This method avoids any judicial guessing as to the rationale behind the award. Remands do not constitute judicial invasions of the arbitrator's province but rather serve to give the parties what they bargained for -- a clear decision from the arbitrators.

This Court cannot clearly ascertain the basis for the plaintiff's award, nor can it be certain whether the arbitration panel considered all the relevant information. Given the ambiguity surrounding the Sargents' $46,000 award, a remand to the arbitrators appears to be appropriate. While arbitration awards generally receive deferential review by the courts, deference is not abdication.

For this Court to engage in meaningful judicial review of plaintiff's award, the basis for the calculations underlying the award must be made known.

For the reasons set forth above, it is this 8th day of December, 1987.

ORDERED

Plaintiffs' motion to vacate the arbitral award of August 19, 1986, is granted, and the award, be and it is vacated. This matter is remanded to the NYSE Arbitration Panel for a full explanation of the manner in which damages were computed so as to permit effective judicial review. Defendant's cross motion to confirm is denied. The Panel shall act expeditiously on the matter and file its final decision with this Court 45 days from the date of this Order.

[signed]
Barrington D. Parker
United States District Judge

Text of Rule 607 "Designation of Number of Arbitrators" of Arbitration Rules of Department of Arbitration, New York Stock Exchange as supplied by respondent Paine-Webber Incorporated to the United District Court for the District of Columbia in Exhibit I to DEFENDANTS' CROSS-MOTION TO CONFIRM ARBITRATION AWARD filed December 12, 1986 in C.A. No. 84-2911

Rule 607. Designation of Number of Arbitrators

(a)(1) Except as otherwise provided in this Code in all arbitration matters involving public customers and other non-members where the matter in controversy does not exceed the amount of $500,000, or where the matter in controversy does not involve or disclose a money claim, the Arbitration Director shall appoint an

arbitration panel which shall consist of no less than three (3) nor more than five (5) arbitrators, at least a majority of whom shall not be from the securities industry, unless the public customer or non-member requests a panel consisting of at least a majority from the securities industry.

(2) In all arbitration matters involving public customers and other non-members where the amount in controversy is $500,000 or more, the Director of Arbitration shall appoint an arbitration panel which shall consist of five (5) arbitrators unless the parties agree in writing to a panel of three (3) arbitrators, at least a majority of whom shall not be from the securities industry, unless the public customer or non-member requests a panel consisting of at least a majority from the securities industry.

(b) Composition of Panels

The individuals who shall serve on a particular arbitration panel shall be determined by the Director of Arbitration. The Director of Arbitration may name the chairman of each panel.

Text of Rule 607 "Designation of Number of Arbitrators" of Arbitration Rules of Department of Arbitration, New York Stock Exchange ("NYSE") as supplied by NYSE Arbitration Counsel to petitioner Ernest E. Sargent and as supplied by petitioner to the United states District Court for the District of Columbia in Exhibit I to MEMORANDUM AND POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO CONFIRM AND TO NOT VACATE AWARD filed December 19, 1986 in C.A. No. 84-2911

Rule 607. Designation of Number of Arbitrators

(a) Public Controversies

(1) Except as otherwise provided in this Code in all arbitration matters involving public customers, and where the matter in controversy does not exceed the amount of

$100,000, or where the matter in controversy does not involve or disclose a money claim, the Director of Arbitration shall appoint an arbitration panel which shall consist on no less than three (3) nor more than five (5) arbitrators, at least a majority of whom shall not be from the securities industry, unless the public customer requests a panel consisting of at least a majority from the securities industry.

(2) In all arbitration matters involving public customers where the amount in controversy is $100,000 or more, the Director of Arbitration shall appoint an arbitration panel which shall consist of five (5) arbitrators, at least a majority of whom shall not be from the securities industry, unless the public customer requests a panel consisting of at least a majority from the securities industry.

(b) Composition of Panels

The individuals who shall serve on a particular arbitration panel shall be determined by the Director of Arbitration. The Director of Arbitration may name the chairman of each panel.

United States Court of Appeals
For the District of Columbia Circuit

No. 88-7133

September Term, 1989
CA 84-02911

Ernest E. Sargent, et al.

v.

Paine Webber, Jackson & Curtis, Inc.,
n/d/b/a PainWebber Incorporated, et al.,

Appellants

BEFORE: Wald, Chief Judge; Mikva, Edwards, Ruth B. Ginsburg, Silberman, Buckley, Williams, D.H. Ginsburg and Sentelle, Circuit Judges

O R D E R

Appellants' Suggestion For Rehearsing En Banc has been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing it is

ORDERED, by the Court en banc, that the suggestion is denied.

Per Curiam
FOR THE COURT:
CONSTANCE L. DUPRE, CLERK

BY: [signed]
Robert A. Bonner
Deputy Clerk

United States Court of Appeals
For the District of Columbia Circuit

No. 88-7133

September Term, 1989
CA 84-02911

Ernest E. Sargent, et al.

FILED OCT. 13, 1989

v.

Paine Webber, Jackson & Curtis, Inc., n/d/b/a PainWebber Incorporated, et al.,

Appellants

BEFORE: Buckley and Williams, Circuit Judges, Robinson, Senior Circuit Judge

O R D E R

Upon consideration of appellants' petition for rehearing it is

ORDERED, by the Court, that the petition is denied.

Per Curiam
FOR THE COURT:
CONSTANCE L. DUPRE, CLERK

BY: [signed]
Robert A. Bonner
Deputy Clerk